



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 10183068

Date: AUG. 06, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as senior mechanical engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).¹ See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is August 7, 2018. See 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. The proffered wage is \$94,536 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.²

In this case, the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2018 and paychecks for a portion of 2019 demonstrating that it employed and paid the Beneficiary in 2018 and 2019, as follows:

- \$69,200 in 2018; and
- \$50,474 in gross wages through September 8, 2019.

The amounts on the Form W-2 and paychecks do not equal or exceed the annual proffered wage of \$94,536. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary. The Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary, which is \$25,336 in 2018 and \$44,062 in 2019. Because the record closed before the Petitioner's 2019 federal tax return was due, we will next examine the Petitioner's 2018 federal tax return submitted to the record.

The Petitioner's 2018 federal tax return states a net loss³ of \$10,107. Therefore, for the year 2018, the Petitioner did not have sufficient net income to pay the difference between the proffered wage and the

² Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

³ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page 1 of a petitioner's IRS Form 1120S, U.S. Income Tax Return for an S

amounts it paid to the Beneficiary. As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's 2018 federal tax return states end-of-year net current liabilities of \$192,411. Therefore, for the year 2018, the Petitioner did not have sufficient net current assets to pay the difference between the annual proffered wage and the amounts it paid to the Beneficiary.

The Petitioner submitted its 2018 federal tax return to establish its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). The Petitioner's tax return was prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized ~~when they are~~ paid.⁵ On appeal, the Petitioner submits a letter dated December 6, 2019, from [REDACTED] the company that prepared its 2018 federal tax return, stating that the Petitioner would have had "net income and net current assets in excess of the proffered wage" for 2018 using the accrual method of accounting.⁶ However, if revenues are not recognized in a given year on the Petitioner's tax returns pursuant to the cash method of accounting, the Petitioner may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year on the tax returns, the Petitioner may not shift those expenses to a different year in an effort to show its ability to pay the proffered wage.⁷ Further, [REDACTED] states that it analyzed the Petitioner's financial records for 2018, but it did not submit audited financial statements containing the purported net income and net current assets figures. *See* 8 C.F.R. § 204.5(g)(2). We may, in our discretion, use as advisory opinion statements submitted in evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r 1988). We will not amend the figures on the Petitioner's 2018 federal tax return using the accrual method of accounting as advocated by [REDACTED]

For 2019, the record contains a list of the Petitioner's "Accounts Received," its "Accounts Receivable" and its "Contract/Project Backlog." Some of the figures are listed as "projected." However, these documents are not audited and do not establish the Petitioner's ability to pay the difference between

Corporation. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, net income is found on line 18 of Schedule K to Form 1120S. *See* Internal Revenue Serv., Instructions to Form 1120S, 22, at <https://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last visited July 20, 2020). In this case, the Petitioner's net income is found on line 21 of page 1 of its Form 1120S.

⁴ Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ *See* Internal Revenue Service (IRS) Publication 538, <https://www.irs.gov/publications/p538/ar02.html> (last visited July 20, 2020).

⁶ Under the accrual method of accounting, revenue is recognized when it is earned, and expenses are recognized when they are incurred. *See id.*

⁷ Once a taxpayer has set up its accounting method and filed its first tax return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. *See id.*

the annual proffered wage and the amounts it paid to the Beneficiary in 2019. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, the Petitioner asserts that we should consider its market value, which it asserts is far greater than its net asset value, as evidence of its ability to pay the proffered wage. The Petitioner, however, has not submitted any evidence of its market value, demonstrated how market value was calculated, or indicated how its market value would “generate additional funds needed” as claimed on appeal. The record also contains the Petitioner’s bank statements for the end of 2018 and a portion of 2019. However, the funds reported at the end of the year on its 2018 bank statement reflect the end-of-year cash specified on its 2018 IRS Form 1120S, Schedule L, that was already considered in determining the Petitioner’s net current loss. Further, bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage. The Petitioner’s assertions on appeal do not demonstrate its ability to pay the proffered wage.

Further, where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner has filed another Form I-140 petition for a different beneficiary. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.⁸ We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency.⁹ Without this information, we cannot determine the Petitioner’s ability to pay the combined proffered wages of all of its applicable beneficiaries.

Finally, we may consider evidence of a petitioner’s ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its

⁸ The Petitioner’s ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

⁹ It is the Petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967).

In this case, the record indicates that the Petitioner has been in business since 1993; however, the letter from [redacted] states that the Petitioner has experienced "severe financial difficulties over the years." Therefore, while the Petitioner has demonstrated the longevity of its business, its longevity has not generated financial stability. The petition and labor certification indicate that the Petitioner has 23 employees, although its employer's quarterly federal tax returns for the first two quarters of 2019 show that it has 17 employees. Thus, the number of its employees is unclear. The record also contains an internally created company profile document describing its business and some of its clients and projects, but the information does not establish its overall reputation in the engineering industry. Unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The record also contains a letter dated October 31, 2019, from the Petitioner's President. It states that the Petitioner has not missed a payroll since 1993. It states that it "has logged a backlog of over \$9 million dollars... that will be accomplished over the next 3 years;" that it has received \$1,850,569.25 in 2019 and has billed over \$1,700,000 from January to September 2019; and that it invoices clients at a rate that represents the actual engineer's rate plus an overhead rate, so the "higher the Engineer's Rate, the more that [the Petitioner] bills." However, the Petitioner has not provided evidence to support these claims. As noted, the Petitioner's unsupported statements are insufficient to carry its burden of proof. The Petitioner must support its assertions with relevant, probative, and credible evidence. *See id.*

The President's letter also states that the Petitioner has an existing \$250,000 line of credit that can be increased.¹⁰ A line of credit is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See John Downes and Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). Moreover, the Petitioner's existent loans are reflected on its 2018 tax return as current liabilities, and they were fully considered in our evaluation of its ability to pay the proffered wage. The line of credit cannot be treated as cash or as a cash asset. Finally, we will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Additionally, unlike in *Sonogawa*, the record here does not establish the growth of the Petitioner's business, nor does it establish the occurrence of any uncharacteristic business expenditures or losses in 2018. As noted, the letter from [redacted] states that the Petitioner has experienced

¹⁰ The record contains no evidence to support the claim that the line of credit may be increased.

“severe financial difficulties over the years,” indicating that its 2018 losses were not uncharacteristic. Further, the Beneficiary will not be replacing a current employee or outsourced service, as he is currently employed by the Petitioner in nonimmigrant status. Also unlike in *Sonegawa*, the Petitioner in this case must demonstrate its ability to pay multiple beneficiaries. Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner’s continuing ability to pay the proffered wage pursuant to *Sonegawa*.

The Petitioner has not established its continuing ability to pay the proffered wage from the petition’s priority date onward.

ORDER: The appeal is dismissed.